No. 9748

In the United States Circuit Court of Appeals for the Ninth Circuit

COUNTY OF ALAMEDA (A BODY CORPORATE AND POLITIC, AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA), APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE APPELLEE

INDEX

400845—41——1

TABLE OF CASES

MISCELLANEOUS

MISCELLANEOUS—Continued

Union Bridge U.S., 204 U.S. 364 P-25
Jockey - Derby 83 F 2 715
argente vs S.F. 16 Cal. 255

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9748

COUNTY OF ALAMEDA (A BODY CORPORATE AND POLITIC, AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA), APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE APPELLEE

This is an appeal from a final decree of the Southern Division of the United States District Court for the Northern District of California, filed on October 21, 1940, and ordering the specific performance of a contract between the County of Alameda and the United States under which contract the county was obligated to operate, maintain, and repair a drawbridge situated at Fruitvale Avenue, between the cities of Oakland and Alameda, in Alameda County, California.

FACTS

This is an action brought by the United States against the County of Alameda, the Central Pacific Railway Company, and the Southern Pacific Company, for the specific performance of a contract between the

United States and said County, and to have the rights of all parties defined and declared.

The facts are as follows:

In 1882 the United States condemned certain land situated in Alameda County, California, for the improvement of Oakland Harbor, by the construction of a tidal canal (R. 129). The County of Alameda, The Southern Pacific Company, and others, were defendants in that proceeding. The decree of condemnation was rendered by the Superior Court of Alameda County, and recited in part:

> It is further ordered, adjudged, and decreed that in the construction of said canal, the plaintiff (United States) at its own expense construct and keep in repair suitable bridges across the same on all roads now used as public highways crossing the line of said canal, and also suitable railroad bridges on the present railroad tracks crossing the line of said canal (R. 165).

The canal runs between the cities of Oakland and Alameda, and, in accordance with the decree mentioned above, the United States constructed two highway bridges at Park Street and High Street, and a combined highway and railroad bridge at Fruitvale Avenue (R. 131–132). It is the latter bridge that is the subject of the present controversy. All three bridges were constructed as drawbridges, but were equipped only with hand-operated machinery, and it took approximately 30 minutes to open and 30 minutes to close each of these bridges. After they were

equipped with electrical operating machinery, as hereinafter set forth, it took from 2 to 3 minutes to open, and the same time to close, each bridge (R. 132).

In 1909 the Board of Supervisors of Alameda County adopted a resolution by which the County offered to accept responsibility to maintain, repair, and replace the bridges if the United States would equip them with electrical operating machinery, establish harbor lines along the tidal canal, and agree to lease frontage thereon for the construction of wharves and warehouses (R. 169).

In accordance with the offer of the County mentioned above, the United States installed electrical operating machinery on the bridges, established harbor lines, and made available to the adjacent property owners a twenty-five-foot-wide strip of land, bordering each side of the canal, so that warehouses and wharves could be constructed, and the canal was opened to navigation. After electrical operating machinery was installed the bridges could be opened and closed in from two to three minutes.

On September 3, 1910, the Secretary of War issued a license, revocable at will, to the County of Alameda for the control of the three bridges in question (R. 170). On November 10, 1913, the Board of Supervisors of Alameda County accepted the license by an appropriate resolution (R. 172).

The cities of Oakland and Alameda have enjoyed a steady growth (R. 139), and the County has, with Federal aid, recently replaced the highway bridges at Park Street and High Street with modern structures

(R. 135). However, the County notified the United States that it intended to cease operating the Fruitvale Avenue bridge at midnight, December 31, 1939 (R. 176), and the railroad notified the District Engineer, War Department, in San Francisco, that it expected the United States to maintain the bridge in question (R. 178). The County is now operating the bridge under a temporary arrangement whereby it will lose no rights it may have in the premises.

The County stated in its notice to the United States that the reason why it would no longer operate the Fruitvale Avenue bridge was a decision of the District Court of Appeals of the State of California, in and for the Third Appellate District, in a cause entitled *County of Alameda* v. *Ross,* 32 Cal. App. (2), 135; 89 Pac. (2) 460. This decision is discussed below.

After the receipt of the notices mentioned above the United States instituted this action in which it is prayed:

That the court order specific performance by the County of its agreement with the United States to operate, maintain or rebuild the Fruitvale Avenue bridge; that the rights of all parties be declared; and for the other temporary and permanent relief as more fully appears from the prayer of the complaint.

ARGUMENT

I

Reply to appellant's argument on the facts

The Tidal Canal was not open to navigation prior to 1913

The question as to whether or not a particular body of water is "open to navigation" is a question of fact

(*Healy* v. *Joliet, etc. P. Co.*, 116 U. S. 191; *Forestier* v. *Johnson*, 164 Cal. 24, 127 Pac. 156). And being a question of fact, the burden of proving navigability is upon the party affirming it (*Mintzer* v. *North American Dredging Co.*, 242 Fed. 553, aff. 245 Fed. 297).

The only "facts" before the Court as to the navigability or nonnavigability of the Tidal Canal are set forth in paragraph VII of the stipulation of facts (R. 131) and in Exhibit 3, which is attached to the stipulation (R. 167). The three bridges are described in paragraph VII, which goes on to say:

> It took approximately thirty minutes to open and thirty minutes to close each of these bridges. * * *
>
> Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges, and scows which could clear said bridges when closed plied up and down said Tidal Canal.

Upon analysis it at once becomes apparent that there is nothing in this statement to show how often the "occasions" happened when the United States operated the bridges, nor how often private interests had "occasion" to operate the bridges on their own responsibility. Moreover, it does not appear how

many, nor how often, "boats, barges, and scows which could clear said bridges * * * plied up and down said Tidal Canal." So far as the agreed statement is concerned, these things may have occurred ten times a day or once a year. But one definite fact was agreed upon, viz: that prior to the installation of electrical operating machinery it took one hour to open and close each of the three bridges. This would delay traffic for a total of three hours each time a vessel which could not clear the bridges when closed passed up or down the Canal. In 1910 the City of Alameda had a population of 23,383, and the City of Oakland had a population of 150,174 (R. 138–9), and it is only reasonable to assume that cities of this magnitude would not often permit such a delay through the bottlenecks of traffic created by the bridges.

The Court, however, need not speculate as to whether the Canal was "open to navigation," prior to the time electrical operating machinery was installed on the bridges, since a contemporaneous statement was made by the Board of Supervisors of the County itself in the Resolution of December 6, 1909 (R. 167), where the unequivocal statement is made that—

> Whereas, that portion of the Canal between said bridges *has never been open to navigation.* [Italics supplied.]

Whether the Board of Supervisors had authority to bind the County by the offer contained in this Resolution is beside the point in determining the question of fact now under discussion. It is invited to the atten-

tion of the Court as a statement of fact, made by those authorized to represent the appellant, at the very time in issue, and certainly greater weight should be given to it than to the speculations of counsel.

It is submitted that in view of the uncertainties contained in the stipulation as to whether or not the Canal was "open to navigation," and in view of the positive statement of the Board of Supervisors of the County that it was not, the appellant has utterly failed to sustain the burden imposed upon it to prove the contrary, and the court below was correct in its finding that the Canal was not, in fact, open to navigation prior to 1913 (R. 252).

II

The County of Alameda entered into a valid binding contract to operate and maintain the Fruitvale Avenue Bridge

(a) The license was issued as an acceptance of the offer of the county contained in the resolution of December 6, 1909

Throughout its brief the appellant argues that "the resolution of 1909 must be construed as an offer, the license of 1910 as a counteroffer, * * * and the resolution of 1913 as an acceptance of said counteroffer" (Brief, pp. 85–6). An analysis of the three documents concerned, and of the Rivers and Harbors Act of June 25, 1910 (36 Stat. 630, c. 382), will demonstrate the fallacy in this argument, and the following comparative table shows conclusively that the three documents in question constitute an offer, an acceptance, and the ratification of the acceptance, which thereafter ripened into a binding contract upon performance by the United States.

Resolution of Dec. 6, 1909, exhibit 3 (R. 167)	Rivers and Harbors Act of June 25, 1910	License of Sept. 3, 1910, exhibit 4 (R. 170)	Resolution of Nov. 10, 1913, exhibit 5 (R. 172)
No provision has ever been made by United States to operate bridges. That portion of Canal between bridges not open to navigation. Recommendation has been made by officer of United States that bridges be turned over to County. The County agrees to accept the bridges, *provided:* (1) That the bridges be equipped with electrical operating machinery. (2) That the United States lease the water front *on such terms as it may see fit.* (3) That the United States establish harbor lines so as to permit the construction of wharves and warehouses.	The three bridges heretofore built by the United States may be turned over to the local authorities in the discretion of the Secretary of War. So much of the appropriation as shall be necessary to meet the terms of the transfer may be expended by the Secretary of War.	Recites provisions of Rivers and Harbors Act of June 25, 1910, authorizing Secretary of War to turn the bridges over to the County. Grants license to County subject to following conditions: (1) That bridges shall be freely open to public. (2) That bridges shall be under supervision of Engineer officer. (3) That the United States shall equip bridges with electrical operating machinery. (4) That County shall maintain and repair bridges. (5) That County shall maintain bridge tenders to operate bridges as "required in the interests of navigation and street traffic."	Recites that County has previously agreed to accept said bridges, *provided:* (1) That bridges were equipped with electrical operating machinery. (2) That the United States lease the water front of the Canal under such conditions as it might see fit. (3) That the United States establish harbor lines so as to permit the construction of wharves and docks. That on September 3, 1910, the Secretary of War issued a license subject to certain conditions. That the United States had equipped the bridges with electrical operating machinery in accordance with the provisions of paragraph 3 of the license. That the United States has performed all things required by it to be performed. That the County accepts the bridges subject to the terms of the License.

The legislative history of the Rivers and Harbors Act of June 25, 1910, shows conclusively that when Congress enacted that portion of the Act dealing with Oakland Harbor it intended to and did authorize the Secretary of War to accept the definite offer of the County to operate and maintain the bridges. Thus

in Senate Report No. 527 of the Sixty-first Congress, Second Session, dated April 11, 1910, the following statement appears on page 615:

> In connection with this improvement a Tidal Canal connecting San Leandro Bay with Oakland Channel was excavated by the United States. This canal was intended for flushing purposes only, and no provision was made for operation of bridges over it which are owned by the United States and are provided with draws. A demand appears to have arisen for the opening of the canal to navigation, as explained in the district officer's report, but the bridges form an impediment to such use, and he recommends that they be turned over to local authorities, who have signified their willingness to accept and operate them.

It is submitted that the foregoing analysis of the three documents in question, when read in the light of the legislative history of the Rivers and Harbors Act of 1910, make it absolutely clear that they are each an essential part of the entire contract in controversy here, and that together they make up the contract in question.

(b) The county of Alameda had and has authority to operate and maintain the Fruitvale Avenue Bridge

The appellant cites a number of authorities defining the powers of County officers in support of the proposition that counties cannot act beyond the express or implied powers granted to them by their charters, or by legislative acts (Brief, pp. 16 et seq.). This, of course, is settled general law, but, it is submitted,

the rules invoked by the appellant have no application to the case at bar for the following reasons:

The California courts have repeatedly held that the powers and jurisdiction of Boards of Supervisors of Counties include such implied powers as are necessary to the exercise of express powers. Thus, in 7 Cal. Jur. 449 the rule is stated that

> Boards of Supervisors are creatures of the statute, and the authority for any act on their part must be sought in the statute. But while their jurisdiction is confined within the statutory limits, still it includes not only the powers expressly enumerated, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly or impliedly prohibited.

See also: *H. D. Haley & Co. of California* v. *McVay, County Auditor,* 70 Cal. App. 438, 233 Pac. 409; *Couts* v. *County of San Diego,* 139 Cal. App. 706, 34 Pac. (2d) 812.

Sec. 32 of the Charter of Alameda County provides:

> Sec. 32. The County Surveyor, subject to such rules and regulations as shall be prescribed by the Board of Supervisors, shall have direction and control over all work construction, *maintenance, and repair* of roads, highways, tunnels, viaducts, conduits, subways, *and bridges.* [Italics supplied.]

It is clear, therefore, that the Board of Supervisors had the power to maintain and repair the Fruitvale Avenue Bridge. And, having that power, the Board necessarily had the power to pay such maintenance

costs as were incurred from year to year. The repair and maintenance of highways and bridges is one of the principal functions of a county, and therefore the authorities cited by the appellant are not in point since all of them deal with situations where the county was clearly acting outside of the scope of any express or implied authority.

Dillon, in Vol. 1, at page 452 of his work on Municipal Corporations, quotes *Bridgeport* v. *Housatonic R. Co.,* 15 Conn. 475, where the general rule discussed above is set forth as follows:

> "In this country," says Church, J., "all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations, that they *may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted.* In doing this, they must [unless restricted in this respect] have a choice of means adapted to ends, and are not to be confined to any one mode of operation."

Certainly, one of the powers inherent in the County, under Section 32 of its Charter, is the construction, maintenance, or operation of bridges, and, as said

above, the County has "a choice of means adapted to ends." The very fact that the County is now operating, repairing, and maintaining the High and Park street bridges "under other arrangements between the United States and said county" shows that the County itself recognizes this principle of law (R. 135).

III

Congress had and has power to authorize the County to operate and maintain the Fruitvale Avenue Bridge even in the absence of an express or implied power in the County conferred by state law

In the case of *Luxton* v. *North River Bridge Company,* 153 U. S. 525, the Supreme Court held that—

> Although *municipal corporations* organized under the laws of the respective States derive their power almost exclusively from the State, yet circumstances may exist where the power of eminent domain may be derived from an act of Congress. Thus Congress, *under the power to regulate commerce,* may authorize the construction of a bridge across navigable waters [by a public corporation] between two states and the taking of private lands for that purpose upon making just compensation.

Here Congress was acting to improve the Tidal Canal for the purposes of navigation, and it follows that even admitting *arguendo* that the implied power of the County to operate and maintain the bridge is doubtful, nevertheless the United States had power to authorize the County to operate the bridge, as Congress did in this case, in the enactment of the Rivers and Harbors Act of June 25, 1910, authorizing the

Secretary of War to turn the bridges over to the County. In other words, there cannot be the slightest doubt but that Congress may create *quasi public* corporations for public purposes, or that Congress may authorize existing governmental agencies, or "a political subdivision of a state having corporate powers" (Cal. Pol. Code, § 3901) to exercise public powers not strictly within its charter.

In the case of *Haeussler* v. *St. Louis,* 205 Mo. 656, 103 S. W. 1034, a municipal corporation was authorized by Congress to condemn land upon which to construct a bridge. Part of the land was not only outside the corporate limits of the city, *but was outside the state in which the city was incorporated.* The court commented upon the case of *Luxton* v. *North River Bridge Co., supra,* and, in holding that that case was applicable, said:

> In the case at bar the city of St. Louis, a corporation, has the charter and legal authority to construct this bridge insofar as the State of Missouri and its laws are concerned. It has the specific grant from the Federal Government, giving it the power to exercise the right of eminent domain, not only in Missouri, but in Illinois. If Congress can charter a corporation to build a bridge spanning from one State to another and clothe it with the power to condemn property in either State, it certainly had the power to *add this power by grant,* to the powers already possessed by the city of St. Louis. *In short, if Congress can create a corporation with such rights, it can grant such rights to one already in existence.* Nor where the way provided for is a

> public way, for public purposes and public use, as in this case, can there be any distinction between granting such rights to a municipal corporation, rather than to a private corporation? The municipal corporation had the right to go beyond its corporate limits and acquire property for this public municipal purpose, and Congress simply says, that with our power over interstate commerce, by land as well as by water, you can extend or make your public highway over a navigable stream, and do what we can do, i. e., take private property therefor, compensating the owner as provided by law. [Italics supplied.]

In other words, the County of Alameda can be authorized by Congress to do what the United States can do; i. e., operate the Fruitvale Avenue bridge.

The decision of the Missouri court in *Haeussler* v. *St. Louis,* is reinforced by Federal authority in *Latinette* v. *City of St. Louis,* 201 Fed. 676, a condemnation action brought in Illinois, by the City of St. Louis, a Missouri municipal corporation, involving the identical bridge and circumstances discussed in the *Haeussler* case. In holding that Congress had authority to confer Federal powers on an existing municipal corporation, the Court said:

> That the construction and operation of the bridge across the Mississippi, so that the bridge should not obstruct navigation of the waterway, and that the bridge and its necessary approaches might serve as a postroad and as a landway for interstate commerce, were national matters, that the nation had the right itself to build and maintain the bridge and approaches,

> and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. *Kohl* v. *U. S.*, 91 U. S. 367, 23 L. Ed. 449; *California* v. *Pacific R. Co.*, 127 U. S. 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891; *Wilson* v. *Shaw*, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351. Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. *In reason the material thing is the principal's authority, not the parentage or birthplace of the agent.* [Italics supplied.]

In the case at bar the United States had authority to confer or grant power to the County to operate the bridge under an agreement with the United States.

It is submitted that, first: The County has express and implied power to operate the bridge in question, and, second: Even if the County does not have such power deriving from the state, nevertheless Congress had authority to confer such power on the County, as was done through the enactment of the Rivers and Harbors Act of June 25, 1910.

It is submitted that (a) the Resolution of December 6, 1909, the License of September 3, 1910, and the Resolution of November 10, 1913, must be con-

strued together, and when so construed evidence a valid contract, and (b) that the County of Alameda had authority and power to enter into such contract with the United States.

IV

The expenditures made by the County to operate and maintain the Fruitvale Avenue Bridge were not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California constitution

In Part III of its Brief the appellant argues that the contract involved here is void because it requires the County to "make a gift of its tax monies to a private railroad corporation" (Brief, pp. 42, et seq.). This argument is based upon the obvious fallacy that the obligation of the County is to the railroad companies, and not to the United States. The fallacy in appellant's argument in this respect is demonstrated by the following short analysis of the facts:

(a) Under the decree of condemnation an obligation was imposed upon the United States to construct "suitable bridges" at the places where highways or railroads were then situated (R. 165).

(b) This was done by the United States, and the Fruitvale Avenue Bridge was maintained by the United States until 1913 (R. 135).

(c) Prior to 1913 the County offered to take over the bridges, provided the United States would do certain things (R. 167).

(d) These things were done by the United States, in compliance with the County's offer, and the bridges were turned over to the County under the contract (R. 175).

(e) This contract was between the County and the United States, and the railroad was not a party to it.

(f) Under the contract the obligation of the County to operate and maintain the Fruitvale Avenue Bridge *was to the United States* and not to the railroad.

(g) Any benefit the railroad received because of the operation and maintenance of the bridge by the County was an incident to the contract between the county and the United States.

(h) Hence the moneys expended by the County to operate or maintain the Fruitvale Avenue bridge were not a gift of public funds to a private corporation, but were expended in compliance with the contract between the County and the United States.

This is a simple factual situation which needs no citation of authorities. In *County of Alameda* v. *Ross,* 32 Cal. App. (2) 135, 89 Pac. (2) 460, however, the court held that the expenditure made by the County to operate and maintain the Fruitvale Avenue bridge was an expenditure "of public money for the *sole* benefit of a private corporation." [Italics supplied.] It is submitted that the above factual analysis shows the error of the California court in this respect, and it is obvious that the court was led into this error by the omission from the stipulation of facts upon which it based its decision of any mention of the Resolution of December 6, 1909 (R. 141). Appellant attempts to explain this omission, for which appellant was responsible, by the specious argument that the Resolution of December 6, 1909, was summarized in the Resolution of November 10, 1913, which was before the California Court (Brief, p. 103). However, the fact of

the matter is that the California court *did not have the 1909 Resolution before it,* and, for that reason did not mention it in its decision, nor consider its effect, as is shown by the fact that the court said:

> The installation of electrical apparatus by the Government for the opening and closing of the drawbridges, *under the terms of the license prior to its execution.* [Italics supplied.]

did not furnish an independent consideration.

The statement italicized above demonstrates the error into which the court was led by the omission of the 1909 Resolution from the stipulation of facts upon which it based its decision. It is obvious that the court would not have said that the bridges were equipped with electrical operating machinery "under the terms of the license" if the court had had before it the 1909 Resolution in which the county offered to accept the bridges if they were so equipped. Moreover, the court was led into making a serious misstatement of fact in stating that the bridges were so equipped "prior to the execution of the license," since paragraph 3 of the license itself (R. 171) constituted the authority under which the electrical operating apparatus was installed *in compliance with the County's offer.* Thus, through the omission of the 1909 Resolution from the statement of facts in *County of Alameda* v. *Ross,* the court was induced to believe that the electrical operating machinery was installed on the bridges as an independent and unconnected act of the United States *prior* to the execution of the license, and that therefore such improvements would not constitute consideration for the acceptance of the bridges

by the County. It is submitted that the facts in that case show beyond a doubt that the electrical machinery was installed on the bridges as an acceptance of the County's offer, and that the license was merely the formal authorization of the Secretary of War that the improvements demanded by the County be made.

The appellant argues that because the 1909 Resolution was mentioned in the 1913 Resolution, which latter document was before the court in *County of Alameda* v. *Ross,* the California court necessarily considered the 1909 Resolution. The fallacy in this argument is demonstrated by the analysis of the statement of the court quoted above, and by the erroneous statement of facts upon which the court relied. Thus, in stating the stipulated facts upon which the court based its decision, the court said:

> In 1901 the government constructed the Fruitvale Avenue bridge and the other two bridges across the estuary, each of which it maintained until 1913. September 3, 1910, the Secretary of War issued to the Board of Supervisors of Alameda County, pursuant to an Act of Congress * * * the revocable license to maintain and operate the three bridges which license is the subject of controversy in this proceeding.

The effect of this omission was to make the California court believe that the original *offer* emanated from the United States, and is unquestionably what led the court into its error in holding that the installation of electrical operating machinery was no consideration for the contract. Indeed, if, as the California court was induced to believe by this omission,

the electrical machinery had been installed on the bridges *prior* to the date of the license, and as an independent act of the United States unconnected with any prior negotiations with the County, then the decision might be supportable. But, as has been shown above, the court did not have the true facts before it, and, inasmuch as the appellant was responsible for this, its argument that the mere summary of the 1909 Resolution in the 1913 Resolution advised the court of the true situation is contradicted by the court's own opinion.

The need for protecting the United States from the effect of judgments in cases to which it is not a party is illustrated here with sharp lines. Not only was an effort made to bind the United States by the decision of a State court in a case to which the United States was not a party, but that decision was obtained on a record of facts that omitted the key fact in the situation on which the rights of the United States turn.

V

The contract between the County and the United States does not violate Section 18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year

As we understand the argument and cases cited in Part II of appellant's brief (pp. 29 et seq.) they are to the effect that the agreement between the County and the United States is in violation of Section 18 of Article XI of the California Constitution because the

total liability of the County became fixed when it accepted the license, and

> the duties and obligations of the County of Alameda, if any, were certain, definite, and fixed and * * * the liability here sought to be imposed, though not definitely fixed or even estimated in dollars and cents, would inevitably exceed the income and revenue provided for the fiscal year in which the contract, if any, was made (Appellant's Brief, p. 39).

The appellant relies on *Chester* v. *Carmichael,* 187 Cal. 287, 201 Pac. 925, and other authorities, in support of the proposition that in cases where the entire consideration on a contract has been furnished to a county, upon an agreement for future payments by the county, the "debt is created at once," and the agreement is therefore in violation of the constitutional prohibition under discussion. We have no quarrel with the authorities cited by appellant, but submit that they do not apply to the facts in this case.

In paragraph XV of the Stipulation of Facts (R. 135–6) the amounts paid by the County each year since 1913–14 to repair and maintain the Fruitvale Avenue bridge are set forth, and it was agreed by the parties that the revenue and income provided for the County for each year was sufficient to meet this expense during each year. In other words, it is agreed that in no one year did the County become obligated beyond the constitutional limits.

Moreover, the California decisions are clear that contracts of the sort here involved are wholly outside the

prohibition of the constitutional indebtedness limitation.

The leading case holding that such an agreement is not a violation of the Section 18 of Article XI of the California Constitution is *Krenwinkle* v. *City of Los Angeles,* 4 Cal. (2) 611, 51 Pac. (2) 1098. In that case the city leased certain property and agreed to pay a certain sum for the first year, and an agreed annual rental thereafter. The aggregate amount of the payments exceeded the income and revenue of the city for any one year. In holding that this was not a violation of the Constitutional prohibition, the court said:

> It is well-settled law in this state that the execution of a bona fide lease for a term of years does not create an immediate indebtedness or liability in excess of the installment of rent presently due. Appellant has apparently marshaled the total of the amounts of the installments to fall due during the terms of years of the leases in order to allege an aggregate of the purported positive, direct liability or municipal debt. Such construction of the leases is not a proper one under the authorities. This court has held that contracts like the leases here being examined do "not create any liability at the time they [are] executed, except a contingent future liability." *Doland* v. *Clark,* 143 Cal. 176, 180, 76 P. 958, 960. "The city had the right," says the court in the opinion, 143 Cal. 176, at page 181, 76 P. 958, 960, "to make contracts, if otherwise unobjectionable, to continue for 5 years," and to provide for payments at different times (citing other decisions of this court). "In order for these contracts to appear void under the Con-

stitution," continues the court, "it must appear that an indebtedness or liability has been incurred for some year exceeding the income and revenue provided for such year." Plaintiff's complaint fails to show any such situation. The leading cases on this subject in this state are *McBean* v. *Fresno,* 112 Cal. 159, 44 P. 358, 361, 31 L. R. A. 794, 53 Am. St. Rep. 191, and *Smilie* v. *Fresno County,* 112 Cal. 311, 44 P. 556. In those cases, the authorities from other states are reviewed, and the provision of the Constitution, supra, is analyzed. All the city contracted to pay in the case of the leases now before us was one sum for the first year of the term, payable in advance, and an agreed annual rental thereafter, payable in equal monthly installments. Such a lease is valid and creates no indebtedness for future rentals. *Walla Walla* v. *Water Co.,* 172 U. S. 1, 19, 20, 19 S. Ct. 77, 43 L. Ed. 341; *City of South Bend* v. *Reynolds,* 155 Ind. 70, 57 N. E. 706, 707, 49 L. R. A. 795.

Nowhere in the leases under consideration is there anything to indicate, nor does appellant claim that the lease contracts are anything more than leases. Each lease, it is true, contains an option granting to the city the right to purchase the leased property when all rentals and other charges are paid, and the city has otherwise complied with the terms and provisions of the leases. The purchase price does not decrease with the amount of rent paid; neither can the rentals paid be applied on the option price. The leases provide that the rental paid is for and in consideration of the use and occupation of the property which the city receives and for the continued quiet use and enjoyment of it during the

> term for which the installment is paid. The sole debt or liability created by the leases is "that which arises from year to year in separate amounts" (*McBean* v. *Fresno, supra*), as the lessor furnishes the quiet use and enjoyment of the leased premises. The nature and effect of these leases serve to distinguish them from the leases construed in such cases as *City and County of San Francisco* v. *Boyle,* 195 Cal. 426, 233 P. 965, *Mahoney* v. *San Francisco,* 201 Cal. 248, 257 P. 49, 57, and other cases in which the leases create a "direct or indirect" obligation on the lessees to pay the total price at the time the leases are entered into, even though the payments are to be made over a term of years. As to such contracts see *California Pac. Title & Trust Co.* v. *Boyle,* 209 Cal. 398, 407, 287 P. 968. In cases like that presented by the leases at bar, the indebtedness is not created until the consideration has been furnished; in the others, the debt is created at once, the time of payment only being postponed. *Walla Walla* v. *Water Co., supra.*

In the case at bar the County occupied the bridge and its obligation to pay for the operation and maintenance of the bridge does not accrue except from year to year. Therefore, the appellant's argument that the agreement is in violation of section 18 of Article XI of the California Constitution is not in point because "the indebtedness is not created until the consideration has been furnished," i. e., the County is under no present obligation to pay for the operation and maintenance of the bridge in the future.

In holding a contract for the disposal of sewage over a period of years not a violation of this provision of the

California Constitution, the court said in *McBean* v. *City of Fresno,* 112 Cal. 159, 44 Pac. 358:

> We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed.

See also *Wykoff* v. *Force,* 61 Cal. App. 246, 214 Pac. 489. *Doland* v. *Clark,* 143 Cal. 176, 76 Pac. 958.

It is submitted that the contract between the County and the United States is valid because each year's expense is within the County's income, and the expense incurred each year is in consideration of the occupation and use of the bridge by the County for such year.

VI

The contract between the County and the United States is not void for lack of mutuality

In Part VII of its brief, appellant argues that the contract between the United States and the County is void for lack of mutuality because the license of 1910 is revocable. As a foundation for this argument appellant necessarily argues that—

> the resolution of 1909 must be construed as an offer, the license of 1910 as a counteroffer and hence as a rejection of the offer of 1909, and the resolution of 1913 as an acceptance of said counteroffer * * * (Brief, pp. 85–6).

We have shown above that the facts do not justify this assertion. The facts disclose that prior to 1913

the Tidal Canal was not open to navigation; that the harbor lines had not been established, and that the waters of the canal were not available to adjacent property owners. The County wanted this situation changed, and in order to secure that end, it offered to assume the expense of operating the bridge, and the fact remains that the United States *did* do the things requested by the County, and *did* expend the sum of $21,358.80 in the electrification of the bridges (R. 135). Whether this was a good or bad bargain for the County is of no interest to the court. As was said in *Skidmore* v. *West,* 186 Cal. 212, 199 Pac. 497:

> With the question of the wisdom of this contract insofar as the county was concerned, and especially with regard to the method and amount of compensation provided, the courts have nothing to do, in the absence of a claim of fraud or mistake (199 Pac. at p. 501).

In connection with the question as to whether or not the fact that the harbor lines could be changed at the direction of the Secretary of War affects the situation, the *fact* remains that the adjacent property owners who constructed wharves or warehouses on the Government property have enjoyed its free use up to the present time—a period of twenty-seven years (R. 448) and the *fact* remains that the United States did expend the sum of $21,358.80 in the electrification of the bridges.

We have argued above that the contract between the County and the United States was not in violation of Section 18 of Article XI of the California Constitu-

tion because the liability of the County to operate the bridge was not an immediate debt but accrued from year to year. We submit that there is nothing inconsistent between that argument and the argument in this section of this brief that the contract is not void for lack of mutuality because of the fact that the license may be revoked by the Secretary of War.

It is the position of the appellee that a fair and reasonable interpretation of the Resolution of 1909, the License of 1910, and its acceptance by the Resolution of 1913, leads to the conclusion that electrification of the bridge by the United States *at the request of the County,* was the consideration for the promise by the County to thereafter operate and maintain it. It thus appears clear that in this view the contract was *executed* by the United States, and lack of mutuality is not a defense, *Chicago M. & St. P. Ry. Co.* v. *United States,* 218 Fed. 228, *Mississippi Glass Co.* v. *Franzen,* 143 Fed. 501. Consequently, the fact that there was a second or subsidiary consideration in the form of the license authorizing the County to operate the bridge did not destroy the mutuality of the contract. In *Tennant* v. *Wilde,* 98 Cal. App. 437, 277 Pac. 137, the court instructed the jury:

> There is no contract at all because it is utterly indefinite. There is nothing definite as to time. If the defendant had not sought to continue it, there would have been no measure for damages. There is nothing he could allege or prove as to how long his employment was to last; no agreement that he would employ him for any particular length of time.

In reversing the judgment the court said:

> (At page 139:) It is upon this point that respondents argue for an affirmance of the judgment. They urge that the contract is severable, one part being a promise by plaintiff Clarence S. Tennant to work as a carpenter and the other, his alleged guaranty that cost of labor and material should not exceed $3,000, and that it is the guaranty which lacks mutuality.
>
> On this point it may be said that, where there is consideration for any of the agreements specified in a contract the contract as a whole cannot be said to lack mutuality or consideration, nor can any particular promise or agreement contained therein be singled out and deemed inoperative because no special or particular consideration appears to have been given or promised for it. Mr. Page in his "Law of Contracts" thus states the rule:
>
> (At pages 861 and 862:) While a consideration is a necessary element of every contract, it is not necessary that each separate promise or covenant should have a distinct consideration. If there is but one consideration offered in return for several promises, and it is accepted for them together, it will support them. This principle is often invoked in question of mutuality of obligation. If A gives value for two or more promises from B, B cannot claim that one of such promises was not supported by consideration, though the parties have not apportioned the consideration to the separate promises. * * *

The language quoted above is clear and unequivocal—if there is consideration for any part of an agree-

ment, the whole contract cannot be said to lack mutuality. Certainly, the expenditure of $21,358.80 by the United States for the electrification of the bridges constituted sufficient consideration. The county relies, on *County of Alameda* v. *Ross,* however, where the court said:

> There is no merit in the petitioner's contention that the installation of electrical apparatus by the government for the opening and closing of the drawbridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality. It is uncertain and revocable at will, rendering the county liable for the expenditure of large sums of public money for the sole benefit of a private corporation with no assurance of retaining the privilege of operating and using the bridges for a single day (89 P. 2d 465).

As was stated above, the court was undoubtedly led into this error by the incomplete and misleading stipulation of facts upon which it based its decision, since the court did not have before it the Resolution of 1909 in which the County offered to accept the bridges provided the United States would electrify them, so that the canal would be open to navigation. Certainly, if the court had had all of the facts before it, it could not have said that an offer, acceptance, and performance constituted no contract, as in effect it did say in that portion of its decision quoted above.

If the theory of the defendant is accepted that "the electrification of the bridges was a mere incident of the contract; a minor stipulation subordinate to the

real object for which the contract was entered into, to wit: the control of the bridges by the County" (Brief, p. 88), then the contract between the United States and the County can be sustained upon the theory that the contract must be construed as a unilateral agreement under which the County agreed to operate and maintain the bridge in consideration of the control of the bridge granted to the County by the United States which ripened into a binding obligation upon performance by the United States. In other words, under this theory the promise or offer of the County was that it would operate and maintain the bridge if the United States would electrify and grant control of the bridge to the County. Neither party was bound when the offer was made, but once the United States had performed its side of the agreement by the electrification of the bridge, and by turning it over to the County, the County became bound to fulfill its promise.

In *Mathewson* v. *Fitch,* 22 Cal. 86, the court said, at pp. 93–4:

> The promise was not a contract depending upon a mutual promise for a consideration. The doing of the thing specified constituted the consideration which made the promise binding. In the case of *Train* v. *Gold* (5 Pick. 380) the Court states the rule in these words: "Thus, if A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time the obligation of the contract or promise is suspended;

> for, until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum;* but on the performance of the condition of the promise, it is clothed with a valid consideration which relates back to the promise, and it then becomes obligatory." To the same effect is the case of *Lousdale* v. *Brown* (2 Wash. 148).

In *Marin Water & Power Co.* v. *Town of Sausalito,* 168 Cal. 587, 143 Pac. 767, the court said:

> And even contracts unilateral at first are sustained upon execution of the optional consideration. In this pleading it is alleged that at all times the plaintiff was ready, able, and willing to perform and did perform all of its duties arising under the agreement, including the supplying of an abundance of pure, fresh water; so that even if we should look upon the obligation of plaintiff to use its best endeavors as wanting the quality of mutuality at first, the perfect success of such endeavors, as pleaded, makes the agreement one capable of enforcement (*Spires* v. *Urbahn,* 124 Cal. 110 (56 Pac. 329); *Bell* v. *Equitable Gas Light Co.,* 141 Cal. 707 (75 Pac. 329); *Bell* v. *Southern Pacific R. R. Co.,* 144 Cal. 573 (77 Pac. 1124)).

In 6 Cal. Jur. 213, the rule is stated as follows:

> As a unilateral contract is not founded on mutual promises, the doctrine of mutuality of obligation is inapplicable to such a contract. Accordingly, where one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time

> of the promise engage to do the act; for, upon the performance of the condition by the promisee, the offer is accepted, the promise becomes binding, and the contract is clothed with a valid consideration.

In this view of the case the County made a promise "to assume all costs of future repair, operation, and replacement" of the bridge "conditioned upon the" electrification and transfer of control of the bridge by the United States. The United States performed the acts demanded by the County and "the contract is not void for lack of mutuality."

VII

The contract between the United States and the County is not void for uncertainty

Sections 1643, 1647, and 1649 of the California Civil Code set forth the general rules for the interpretation of contracts, as follows:

> SEC. 1643. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

The intention of the parties here was that the County should operate and maintain the bridge—which it has done for a period of twenty-seven years.

> SEC. 1647. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.
>
> SEC. 1649. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor

> believed, at the time of making it, that the promisee understood it.

The three documents constituting the contract in this case are unambiguous as to what the parties understood the contract to be, and the fact that prior to 1913 the canal was not open to navigation; that no harbor lines had been established; and that the bridges were not equipped with electrical operating machinery are sufficient explanations of the "circumstances under which the contract was made, and the matter to which it related."

There is no question but that at the time this contract was entered into the United States and the County intended to enter into a valid and binding agreement, and—

> As between two permissible constructions, that which establishes a valid contract is preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing. The parties are deemed to have intended a lawful, rather than an unlawful, act, and their agreement is to be construed, if possible, as intending something for which they had the power to contract (6 Cal. Jur. 268).

In *Greenfield* v. *Sudden Lumber Co.,* 18 Cal. App. (2) 709, 64 Pac. (2) 1007, the court laid down the general rule of interpretation of contracts as follows:

> Where it is manifest that persons have endeavored to contract one with the other, courts are constrained to find in favor of the success rather than of the failure of their efforts where

> evidence is present warranting such inference. As said in *Meyers* v. *Nolan* (Cal. App.), 63 P. (2d) 1216, 1217: "The law does not favor the destruction of contracts because of uncertainty but will, if feasible, so construe contracts as to carry into execution the reasonable intentions of the parties if they can be ascertained."

With these general rules in mind, we shall discuss the proposition (a) that the contract is not void for uncertainty because the license is revocable, and (b) that the contract is not void for ambiguity.

(a) The contract is not void for uncertainty because the license is revocable

The fact that a contract does not provide for a definite time for its termination does not render it void for uncertainty. Thus, in *Noble* v. *Reid-Avery Co.*, 89 Cal. App. 75, 264 Pac. 341, the contract provided for the exclusive sale of welding rods within a specified territory so long as the seller gave "faithful service to the trade" and produced "business that warranted the territory allotted to it." In answer to the argument that the contract was void for uncertainty the court said:

> The principal reasons urged against the validity of the contract is that it lacks definiteness, certainty, and mutuality, in that it is claimed that it cannot be ascertained from the contract what period of time appellant was to refrain from transacting business in the allotted territory, nor the duration of the sales agency conferred upon respondent by appellant. However, the duration of the contract seems to be

> settled by the allegations in the answer hereinbefore set forth (faithful service and production of business), which not only is conclusively presumed to be true for the purpose of this appeal, but is fully borne out by the testimony of the witnesses in the case.

In *Sutliff* v. *Seidenberg et al.,* 132 Cal. 63, 64 Pac. 131, the contract was to remain in force "as long as our goods find a ready sale on this coast," and the court held that it was not void for uncertainty.

To paraphrase the contract involved in the *Sutliff* case it may be said that the contract involved here is to remain in force so long as the Secretary of War does not, in the exercise of his general powers, revoke the license. It is submitted that such an interpretation would work no hardship on the County since the obligation of the County would cease immediately that the license was revoked if the Secretary of War in carrying out the duties of his office, found revocation necessary. Moreover, the parties have acted under the contract for a period of twenty-seven years, and have certainly expressed their intention as to how they believe their respective obligations under it should be construed.

Furthermore, the reserved power to the United States to revoke the license is no more than would have been reserved to the United States anyway by operation of law. The United States has paramount authority over navigable waters carrying with it power to revoke any such license. (*Greenleaf Johnson Lumber Co.* v. *Garrison,* 237 U. S. 251.)

(b) The contract between the United States and the County is not void for ambiguity

The County argues in its brief that the contract between the County and the United States is "void for uncertainty because of the ambiguity of its provisions." This argument is based upon several fallacies, the most glaring of which is the statement that because the United States was obligated under the decree in the *Crooks* case to construct "suitable bridges," it was obligated to install electrical operating machinery on them, and in doing that only did what it was "previously under obligation to do." Inasmuch as the first mention in the record as to the installation of electrical machinery on the bridges is contained in the 1909 Resolution, it at once becomes apparent that the appellant's argument has no support in fact.

Appellant argues that the contract is ambiguous (Brief, p. 98) because of the provisions of the Rivers and Harbors Act of 1910 that the bridge be turned over to the County—

> upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities.

Even admitting *arguendo* that the provisions of the Act may have been ambiguous, nevertheless any latent ambiguity was cured when the license was issued, and the Secretary thus evidenced what conditions he thought were "equitable and just." The fallacy in appellant's argument is illustrated by the fact that appellant argues that the terms of the Rivers and Harbors Act made the contract ambiguous. This, of course, is

not true, since the Act was merely the authority under which the Secretary of War acted, and the contract itself is evidenced by the three instruments discussed herein.

The appellant also argues that, because the license provided that the bridge should "be under the supervision of the Engineer District in which the bridge is situated," the contract is ambiguous (Brief, p. 100). The fallacy in this argument lies in the fact that the bridge crossed a navigable waterway which was exclusively under the supervision and direction of the United States. This provision in the license amounts to no more than a statement of the law, since Congress has always had power to supervise bridges over navigable waterways—whether owned by the United States or a State agency. Thus, in *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, the Supreme Court held that a bridge over an interstate waterway, although erected under the sanctions of a State and not at the date of its erection—

> an illegal structure or an unreasonable obstruction to navigation in the condition, at that time, of commerce and navigation on the Monongahela River, the bridge must be taken as having been constructed with knowledge, on the part of all, of the paramount power of Congress to regulate commerce among the States, and subject to the condition or possibility that Congress might, at some time after its construction and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions. * * *

It is obvious that the United States has always retained authority over the bridge in controversy here through the grant of paramount power to control navigable waters. Under the *Monongahela Bridge Co.* case above, the United States has such power over the Park and High Street bridges which are owned by the County, and it is thus clear that the question of title is unimportant as to this phase of the case.

VIII

The County of Alameda is now estopped to set aside its contract to operate and maintain the Fruitvale Avenue Bridge

It has been stipulated that the United States equipped the bridges in question with electrical operating machinery, and there is no conflict in the evidence that the United States made available to adjacent property owners the twenty-five-foot strip of land bordering the canal, and established harbor lines, so that a strip of valuable land bordering the canal, was made available to adjacent property owners, as is shown by the map marked Exhibit 10 (R. 390). The development of the canal area, all of which was for the benefit of the County, would have been seriously handicapped had the United States refused to equip the bridges with electrical operating machinery so that they could be expeditiously opened and closed, or to make available to the public easy access to the canal itself, or to permit the construction of wharves and warehouses on the twenty-five-foot strip of land bordering each side of the canal.

All of these things were done within the County of Alameda, at its special instance and request. As a result the County, and the public, benefited to an extent impossible to measure in dollars; also it must be conceded by all parties that a large amount of money was expended by the United States in this connection, and that the United States gave up valuable property rights.

In this view of the case it is clear that the County is now estopped to rescind or repudiate the contract to operate and maintain the Fruitvale Avenue bridge after enjoying, for a period of almost twenty-seven years, the benefits of the improvements made by the United States at the County's request, and after the United States had given up valuable property rights in connection with such improvements. The rule of equitable estoppel, as applied against counties, is stated in 7 Cal. Jur. at page 516, as follows:

> Public corporations, like individuals, are bound to act in good faith and deal justly. They are not permitted to enter into contracts involving others in expensive engagements, silently permit these contracts to be executed, and then repudiate them because certain statutory steps have not been pursued. A county may thus be equitably estopped by its acts, in the same manner as an individual, when acting within the scope of its powers. Under this salutary doctrine, it has been held that after paying money for a bridge which has been completed, and of which the county enjoys the benefit, a county is estopped to maintain an

> action to recover the money, if the contract under which it was paid, though legally defective, was not immoral, inequitable, or unjust.

In the case at bar the County not only permitted the United States to "enter into expensive engagements," but such engagements were entered into at the express request of the County, and for the benefit of the County. It is true that a county may not be estopped unless it was acting within the scope of its authority, but it has been shown above that the construction, operation, and maintenance of bridges is expressly within the powers of a county so that this question is not involved here.

In *County of Sacramento* v. *Southern Pacific Company,* 127 Cal. 217, the county agreed to pay the railroad company a stated sum in consideration of the construction by the railroad of an overhead pass on a railroad bridge; such overhead pass to be used for public-highway purposes and to be maintained by the railroad. After the work was performed by the railroad the county sought to recover the amount paid by it upon the ground that its contract with the railroad company had not been made as provided by statute, and therefore was not binding on the county. In commenting upon this proposition the Supreme Court of California said:

> Possibly in this case the law was not carried out * * *. But still, the all-important fact remains that these parties entered into the contract in the utmost good faith. The advice of the law officer of the county was taken, and he

advised that the contract was a lawful one and was sufficiently evidenced; the work contracted for was done; the money paid for the work; the party paying the money received full value for it, and still enjoys the benefits received from the contract. Under such circumstances a plain example of estoppel is before us, and by reason of that estoppel the plaintiff is forever barred from recovering the money involved in this litigation. * * *

But the power of a board of supervisors to construct bridges, to build and lay out roads, to secure easements in the form of rights-of-ways for public travel, are matters within the jurisdiction of the board of supervisors. * * * The county could buy a bridge or lease a bridge. * * * If a county may buy a bridge, or rent a bridge, it may purchase the exclusive right-of-way over a bridge. *We need not split hairs in giving a technical name to the interest which the county has in the bridge, but it is apparent to everyone that it has a substantial interest therein, and, in the absence of some claim or showing to the contrary, we may assume that such interest is full value for the money expended.* [Italics supplied.]

The case at bar presents a clear case of estoppel. The County of Alameda initiated the whole question of opening the canal to navigation and the installation of electrical operating machinery on the bridges. The United States accepted the County's offer, and expended money and gave up valuable property rights for the benefit of the County, and the County has en-

joyed the benefits it received for a period of almost twenty-seven years, but now seeks to repudiate the whole transaction. Under the facts of this case it is respectfully submitted that the County is now estopped to set aside or repudiate its contract to operate, maintain, repair, or replace the bridge in controversy.

IX

The California courts had no jurisdiction to determine substantial rights of the United States in *Alameda County* v. *Ross*

The appellant frankly admits that the California courts had no jurisdiction to determine substantial rights of the United States in *County of Alameda* v. *Ross* (Brief, p. 102). But it seeks to come in the back way by arguing that the United States is bound by *County of Alameda* v. *Ross* under the rule laid down in *Erie Railroad Co.* v. *Tompkins,* 204 U. S. 64.

This argument is based upon the fallacies that *County of Alameda* v. *Ross* is based on the same record of facts as the case at bar, or correctly states the law of California as to the facts of the case at bar, and upon the legal error that the *Erie Railroad* case applies to cases involving Federal questions.

We have shown above that the California court was led into error by the omission of the Resolution of 1909 from the stipulation of fact upon which it based its decision. *County of Alameda* v. *Ross* has all the earmarks of a "friendly suit," by which courts are sometimes led into innocent error to the detriment

of third parties. There can be no question but that the interests of the United States were so directly involved in *County of Alameda* v. *Ross* as to make the decision an absolute nullity.

Alameda County v. *Ross* was a mandamus proceeding instituted to determine whether the purchase of bolts to repair the railroad portion of the Fruitvale Avenue bridge was in violation of the California Constitution. The United States, of course, was not, and could not have been a party to that proceeding.

It is beyond argument that a state court has no jurisdiction in an action on a contract in which the United States is one of the contracting parties, and while the fact—

> That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. *Louisiana* v. *McAdoo,* 234 U. S. 627. See also *Minnesota* v. *Hitchcock,* 185 U. S. 373.

The practical effect of the judgment in *Alameda County* v. *Ross* if given the effect argued for by appellant would be that the United States would have to repair and rebuild the bridge in question. Therefore, it is clear—

> That the interests of the Government are so directly involved as to make the United States a necessary party, and therefore to be consid-

> ered as in effect a party, although not named in the bill. *Wells* v. *Roper,* 246 U. S. 335.

Under these circumstances it is plain that the effect of the judgment in *Alameda County* v. *Ross* so directly involves the interests of the United States as to make it a necessary party, and, being a necessary party to the controversy, any action of the State court to determine substantial rights of the United States is a nullity. Moreover, the United States had not given its consent to be sued in a state court in the type of proceeding involved in *Alameda County* v. *Ross* and therefore any proceeding in the state court which purports to affect the rights and interests of the United States is not within the jurisdiction of such court.

The fact that *Erie Railroad Co.* v. *Tompkins* does not apply is made clear by the decision itself, which states:

> Except in matters governed by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the State.

Board of County Commissioners, Jackson County v. *United States,* 308 U. S. 343, holds that Federal and not State law determines whether the United States, suing on behalf of an Indian, can recover interest on county real estate taxes erroneously assessed upon the Indian's land within the county. The settled state rule was that no interest could be recovered, but the Supreme Court, although reaching the same result on

the basis of Federal law, expressly held that state law did not apply, and stated:

> Since the origin of the right to be enforced is the treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties, or statutes of the United States, and does not owe its authority to the lawmaking agencies of Kansas. Cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

That the California court did, however, undertake to interfere with an Act of Congress, is conclusively shown by the fact that the Court specifically stated in its opinion that the *"license is the subject of controversy in this proceeding."* The error of the Court in this regard is made doubly apparent because the proceeding involved was a mandamus action having to do with State officers.

In the case at bar the origin of the rights of the United States in the premises, derives first from its Constitutional power over navigable waters, and, secondly, through the enactment of the various Rivers and Harbors Acts having to do with the improvement of Oakland Harbor generally, and specifically through the Rivers and Harbors Act of 1910. These are "matters governed by the Federal Constitution or by Acts of Congress," and the laws of a State can have no application (*Frederick S. Deitrick, Receiver,* v. *Thomas E. Greaney,* 309 U. S. 190).

In *Byron Jackson Co.* v. *United States,* 35 Fed. Supp. 665, an action was brought against the United States

in the Federal Court in California on a contract made in the District of Columbia for the sale of pumps. The contract contained a clause providing for liquidated damages, and, in holding that such clause was enforceable under Federal principles, irrespective of the rule of *Erie RR.* v. *Tompkins,* and notwithstanding the law of California where the contract was to be performed, the Court said:

> It is inconceivable that the Congress of the United States, in surrendering a part of the sovereign's immunity, intended to subject the determination of the validity of contractual undertakings to the laws of each state rather than to the general laws of the United States. To have done so, would be to deprive the Government, when sued, of uniformity and similarity of principles. This, in the case of a government, the domain of which is as vast as that of the Government of the United States, would result disastrously.

It is, therefore, clear that the decision of the California Court in *County of Alameda* v. *Ross* is not applicable to the case at bar, because it is in direct violation of the rule—

> that federal courts do not follow state decisions as to Federal rights, whether arising under the Constitution, treaties, or statutes. Such rights are expressly excepted from the Rule of Decisions Act (28 U. S. C. 725), in fact, such an express exception is unnecessary (2 Ohlinger's Federal Practice 369).

Moreover, the doctrine of *Erie* v. *Tompkins* has never been applied by the Supreme Court except in cases

where the jurisdiction of the federal court rested exclusively on diversity of citizenship; and the opinions of the Supreme Court foreshadow that the rule will be confined to that class of case. See *Klaxon Co.* v. *Stentor Elect. Co.,* U. S. Sup. Ct., Oct. Term, 1940, No. 741, Decided June 2, 1941. See also *Royal Indemnity Co.* v. *United States,* U. S. Sup. Ct. Oct. Term, 1940, No. 817, Decided May 26, 1941.

X

The Court did not err in refusing to admit testimony from *United States* v. *Crooks*

Upon reading appellant's brief (pp. 117 et seq.) relative to the admissibility of Major Mendell's testimony in *United States* v. *Crooks* it now appears clear that such testimony was offered:

> (a) To "explain" the 1874 report put in evidence as appellee's Exhibit 8 (R. 353), and
>
> (b) To vary the decree of 1882 by which the United States got title to the land upon which the tidal canal was constructed.

This section of this brief will confine itself to a discussion of the two questions mentioned above.

(a) Major Mendell's testimony in *United States* v. *Crooks* is utterly immaterial in "explanation" of the 1874 report (Exhibit 8, R. 353)

The report in question was offered merely to show the historical background of this litigation (R. 469). An examination discloses very plainly that it is merely a preliminary report. Thus, on the next to last page there is the statement that—

> We will close this report by stating that there are many details connected with this improve-

> ment into which we cannot enter without prolonging this paper to an unreasonable length (R. 369);

and the last page contains the only reference to bridges as follows:

> Again, there will be land damages, and bridges will be required over the proposed canal (R. 370).

Major Mendell, the author of the report, himself testified that he not only had no authority to build a bridge at Fruitvale Avenue but that he had no authority at the time he testified to even construct the canal (R. 195). It is thus evident that at the time of the 1874 report, and at the time Major Mendell testified in the condemnation proceedings, no specific plans for specific bridges had been prepared or adopted.

The report is dated in 1874 and Major Mendell did not testify in the condemnation proceedings until eight years later. Thus his testimony is too remote to be material.

While Mendell was a defendant in the condemnation proceedings, his testimony is not here admissible as an admission against interest because the question of his title or interest is not involved here, while his testimony is sought to be introduced against the United States.

(b) Major Mendell's testimony is not admissible to vary the 1882 decree

While the appellant now argues that Mendell's testimony is material to "explain" the 1874 report, it was also offered to vary the decree of condemnation.

Thus, on pages 341 and 342 of the Record in the case at bar there is the following colloquy:

> Mr. COAKLEY. We feel Major Mendell's testimony should go in in its entirety, for whatever connection it may have, explaining this report, *describing the manner of the construction of the proposed canal.* * * * [Italics supplied.]
>
> The COURT. In that condemnation proceeding, they covered a certain field. This particular testimony you are asking to have was passed upon in that proceeding. In the findings in those proceedings, I presume they found everything essential or necessary to the case?
>
> Mr. TOOLE. Yes.
>
> The COURT. Therefore, it does not need the testimony of the individual witnesses before the Court now to be brought out if they had sufficient evidence upon which to predicate what they did find. You would want this Court to find something in the condemnation proceedings over and above what was actually found upon the proceedings; is that the point?
>
> Mr. COAKLEY. No; we say that the findings of fact, conclusion of law and decree and the opinions which are stipulated in this agreed statement of facts are ambiguous *in that they do not go into detail.* * * * [Italics supplied.]
>
> The COURT. In other words, you bind the Court by testimony of a witness who testified before the Court, even though the findings do not recite what type of bridges they were to be. In other words, he recommended a certain type

> of bridges; and you would enlarge the findings to embrace what he testified—that is it, is it not?
>
> Mr. COAKLEY. Yes, your Honor; that is proper.

The foregoing shows that the appellant frankly admitted that the whole purpose of the offer of Mendell's testimony was to add to and vary the decree and findings in the condemnation proceedings. Appellant's suggestion that such offer is material to "explain" the report is an attempt to do indirectly that which cannot be done directly. The report needs no "explanation" since it was merely a preliminary survey, made eight years prior to the time Mendell testified, and its only value to this court is to inform the Court of the historical background of the instant case.

The quotations from the Record set out above make it evident that any consideration by this court of this testimony must necessarily vary or enlarge the condemnation decree.

Thus at page 119 of its brief the appellant states:

> If at the time the decree was rendered it was contemplated that the canal would be constructed for navigation, then the Government was bound to construct and maintain a navigable waterway under said decree (in *U. S.* v. *Crooks*) and was also obligated thereunder to equip the Fruitvale Avenue Bridge for electrical operation * * *.

In view of the fact that the complaint, the opinion, the findings of fact and conclusions of law, and the

decree in *United States* v. *Crooks* were stipulated in evidence, and are silent as to the matters mentioned by appellant, it would vary the decree if it were determined by collateral evidence that "if" the United States acquired certain rights, additional duties not mentioned in any of the pleadings were imposed upon it. Neither Major Mendell, nor any other witness, could enlarge or modify the scope of the condemnation proceedings as defined in the complaint and which are found on page 145 of the Record in this case, as follows:

> That the United States of America is duly authorized and empowered to improve Oakland Harbor, in said County and State, in the interest of commerce, and for that purpose it becomes and is necessary to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, which forms said Oakland Harbor, for the purpose of removing the sediment from the same, and thereby increasing the depth of water, and improving said Oakland Harbor.
>
> That to make and excavate said tidal canal for the flow of the tides into the head of San Antonio estuary—said Oakland Harbor—as proposed, it becomes and is necessary to have and use the tract or strip of land above described, over and across which to make and excavate the said canal.
>
> That this proceeding is instituted for the purpose of condemning said tract and strip of land

> for the use aforesaid; that the taking of said land is for a public use, authorized by law, and by the Government of the United States.

Nowhere in the Complaint in *United States* v. *Crooks* will the Court find any allegation to support defendant's statement, quoted above, that as a result of these proceedings the United States became obligated to provide a navigable waterway or to construct electric drawbridges.

We submit that there is no ambiguity in the decree in the *Crooks* case because of its silence as to how the canal was to be constructed. The court was silent on that question because the method of construction of the canal was not before it. The silence of a court as to a question not before it does not constitute an ambiguity. It is true that the decree placed the obligation on the United States to construct and maintain "suitable bridges" across the canal where public roads and railroads were then situated. This expression is not ambiguous. The purpose of the court was obviously to provide that the construction of the canal would not interfere with public travel, and to save harmless the county and the railroads since they had not asked for damages. The type of bridges to be built was necessarily left to the discretion of the United States because all plans for the construction of the canal were then in a preliminary state.

The matter before the court in the *Crooks* case was the condemnation of the land comprising the site of the proposed tidal canal. Under the complaint (R. 144) the only matters to be decided by the court were

first, the right of the United States to bring the suit, and, this question being decided in the affirmative, only the question of damages remained for decision.

The matter before the court in the instant case is the construction of an alleged contract between the United States and the County of Alameda. The issues in the two cases are neither connected nor related.

The *Crooks* case was a condemnation suit; this is a suit on a contract.

In *Marshall* v. *Hancock,* 80 Cal. 82, 22 Pac. 61—

> The controverted question in the court below was as to the genuineness of a deed from one Michael White and wife to Henry Hancock, under which the defendants claimed to be the owners of one-half of the real estate in controversy. The deed appeared on its face to have been regularly executed and acknowledged. The plaintiffs claimed it to be a forgery, and that Michael White was out of the state at the time it purported to have been signed and acknowledged. The court below, after hearing testimony as to the execution of the deed, held the same to have been executed and admitted it in evidence. * * *
>
> The defendants were permitted to introduce in evidence the testimony of White given in an action not shown to have been between the parties to this action, *or to have involved the matter in controversy here.* The object was to show declarations of White, who was deceased, tending to show that he executed the deed in controversy. The admission of this testimony was erroneous. [Italics supplied.]

The rule has been concisely stated in *Duffy* v. *Blake* (Wash.) 157 Pac. 480, in which the court held that—

> In order for evidence adduced at former trial to be available at subsequent trial, the two actions must concern the same subject matter, the issues must be identical, and proof must be directed to a fact material in both cases.

The case at bar and the *Crooks* case do not concern the same subject matter; the issues are different; and the offer of the defendant is not directed to a fact material in both cases.

In conclusion it is apparent that Mendell's testimony in 1882 cannot be said to explain, or bear upon the historical accuracy of the 1874 report. Its remoteness in point of time removes it from the field of logical relevance into which his contemporaneous declarations or testimony might be said to fall.

It is respectfully urged that the real reason for its offer is to create a basis for argument that the decree in the *Crooks* case imposed obligations upon the United States not therein expressed. The ambiguity urged as reason for the reception of the proffered evidence does not exist in the decree but is conjured up from the evidence itself and assumptions as to its effect on the court's decision in that case.

XI

CONCLUSION

A valid and binding contract exists between the County of Alameda and the United States under which the County is obligated to maintain, operate, or

replace the Fruitvale Avenue bridge; the California court had no jurisdiction to determine substantial rights of the United States; the benefit accruing to the railroad companies was a mere incident to the primary obligation of the County to the United States.

Respectfully submitted.

FRANCIS M. SHEA,
Assistant Attorney General.

FRANK J. HENNESSEY,
United States Attorney.

WILLIAM E. LICKING,
Assistant United States Attorney.

BRICE TOOLE,
Attorney, Department of Justice.

Of Counsel:

SIDNEY J. KAPLAN,
Special Assistant to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1941